

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.62 OF 2018

Ganesh Associates and Ors.

.. Petitioners

V/s.

Sandhu Raghunath Kate and Ors.

.. Respondents

Mr.S.R.Nargolkar I/b Mr.Swapnil Mohite for the petitioner

Mr.Vilas S. Shelar for the respondent nos.1 to 5

CORAM: K.K. TATED, J

DATED : DECEMBER 4, 2018

P.C. :

1 Heard the learned counsel for the parties.

2 By this petition under Article 227 of the Constitution of India the Petitioner original defendant nos.1 and 2 challenges the order dated 11.10.2017 passed by 8th Joint Civil Judge, Senior Division, Pune below Exhibit- 100 in Special Darkhast No.59 of 2011 by which the Trial Court directed both the parties to furnish names and addresses of atleast 3 qualified Civil Engineers from whom one of them can be assigned work of carrying out measurement of the suit shop and flat.

3 In the present proceeding, initially Respondent nos.1 to 4 original plaintiff filed Special Civil Suit No. 2495 of 2010 in the

court of 3rd Joint Civil Judge, Senior Division, Pune at Pune for specific performance of contract, possession of the suit flat and shop, and for damages. That suit was decreed by the Trial Court by judgment dated 23.04.2013. Operative part of the said decree reads thus:

“ORDER

- (1) *The plaintiffs' suit is decreed partly with costs.*
- (2) *Defendant nos.1 and 2 are directed to execute sale deed of flat admeasuring 1050 sq.ft. and shop admeasuring 750 sq.ft. Which is reserved in 'J' wing of the building situated over field survey no.21/4 (more particularly described in para no.1 of the plaint.)*
- (3) *After execution of sale deed defendants shall hand over the possession of flat admeasuring 1050 sq.ft. and shop admeasuring 750 sq.ft. which is reserved in 'J' wing of the building situated over field survey no.21/4 (more particularly described in para no.1 of the plaint.)*
- (4) *Defendant nos.1 and 2 shall pay interest @ 24% p.a. from 1/1/2007 till 9.8.2010 on the sale price of flat and shop Rs.50,00,000/- (Not the principal amount Rs.50,00,000/-)*
- (5) *If the defendant nos.1 and 2 failed to deposit the said amount within a month, defendant nos.1 and 2 shall pay interest @ 24% p.a. from 9.8.2010 till realization of the decretal amount.*
- (6) *Defendant nos.1 and 2 also shall pay Rs.6,50,000/- alongwith interest @ 6% p.e. from 15/09/2009 till filing of the suit and till the realization of decretal amount.*
- (7) *Decree be drawn up accordingly.”*

4 Thereafter, Petitioner original defendants preferred First Appeal No.925 of 2013 before this court. Same was admitted by this court. In that First Appeal Petitioner original defendant preferred Civil Application no.2725 of 2013 for stay of the judgment and decree passed by 3rd Joint Civil Judge, Senior Division, Pune dated 23.04.2013. At that time, advocate for the Petitioner original defendant nos.1 and 2 made a statement before this court in Civil Application No.2725 of 2013 that they are not pressing prayer in respect of clause nos.1 to 3. Operative part of the order in the judgment dated 23.04.2013. Clause nos.1 to 3 reads thus:

“ORDER

(1) The plaintiffs' suit is decreed partly with costs.

(2) Defendant nos.1 and 2 are directed to execute sale deed of flat admeasuring 1050 sq.ft. and shop admesuring 750 sq.ft. Which is reserved in 'J' wing of the building situated over field survey no.21/4 (more particularly described in para no.1 of the plaint.)

(3) After execution of sale deed defendants shall hand over the possession of flat admeasuring 1050 sq.ft. and shop admeasuring 750 sq.ft. which is reserved in 'J' wing of the building situated over field survey no.21/4 (more particularly described in para no.1 of the plaint.)

5 The learned counsel for the Petitioner submits that at the time of passing the impugned order dated 11.10.2017, the learned 3rd Joint Civil Judge, Senior Division, Pune failed to consider the

fact that for similar reliefs, earlier Respondent original plaintiff filed Application below Exhibits- 20, 45, 47, 83, 91 and 95. Same were rejected by the Trial Court. He submits that inspite of these facts, the Trial Court has considered the Respondent original plaintiffs' Application below Exhibit-100 and allowed the same. He submits that the said order is required to be set aside on various grounds as stated in Writ Petition. Those grounds read thus:

“A. That the impugned order is illegal and bad in law.

B. That the learned executing Court ought to have appreciated that the application filed under Section 47, 151 and 152 of C.P.C. such reliefs cannot be granted.

C. That the learned executing court ought to have appreciated that the executing Court cannot go behind the decree and in favr it is prohibited from going behind the decree. It is the duty of the executing Court to execute the decree as per the decree itself.

D. That the learned executing Court ought to have appreciated that the predecessor of the executing Court has already rejected the bunch of applications below Exbibits 20, 45, 47, 91, 92, 95 and 105 and, therefore, the learned Judge completely erred in allowing the same when the earlier applications were rejected.

E. That the learned executing Court ought to have appreciated that such type of application below Exhibit 100 is clearly barred by the principles of res judicata and constructing res judicata mentioned under Section 11 of the Code of Civil Procedure, 1908 and once the issue is decided between the parties, the

same cannot be agitated in a fresh application.

F. That the learned executing Court ought to have appreciated that the concept of res judicata is also applicable during the proceedings even to interlocutory applications as clarified by the Hon'ble Supreme Court of India.

G. That the learned executing Court ought to have appreciated that once the applications below Exhibits 20, 45, 91, 92 and 95 were rejected the trial court clearly erred in exercising its jurisdiction to allow the same and directing the suit flat and shop to be measured by the impugned order."

6 The learned counsel for the Petitioner submits that it is to be noted that Respondents original plaintiffs have not made any Application in the Trial Court for review or recalling the order passed by Trial Court below Exhibits- 20,45, 47, 83, 91 and 95. He submits that Trial Court on its own reviewed all those orders. Hence, order dated 11.10.2017 is required to be set aside.

7 On the other hand, the learned counsel for the Respondent nos.1 to 4 original plaintiff vehemently opposed the present Writ Petition. He submits that after filing the Writ Petition before this court, the decree holder and judgment debtor i.e. Petitioner nos.1 and 2 and Respondent nos.1 to 4 original plaintiff moved before the Trial Court and by consent, Trial Court passed order dated 13.11.2017 appointing their architect as per order dt.11.10.2017 below Exhibit-100. He submits that impugned order acted by both the parties with consent. To that effect he has placed on record order dated 13.11.2017 passed by 8th Joint Civil Judge,

Senior Division, Pune below Exhibit-1. Same is taken on record and marked 'X' for identification. Operative part of the said order reads thus:

"ORDER

1. Ms.Anuradha Govardhan, architect is hereby appointed commissioner on behalf of J.D. and Sou. Deepali Junagade, civil engineer is hereby appointed commissioner on behalf of D.H.

2. Both commissioners are hereby directed to carryout the measurements of the suit flat and suit shop jointly and in coordination with each other after having prior intimation, in advance, of the dates of commission work to D.H. and J.D. or their representatives, if any.

3. Both commissioners are hereby directed to maintain a proper record of the dates of each and every activity done by them in pursuance of the commission work, such as, receipt of writ of commission work, the date of intimation given to each other and to the parties or their representatives, the mode by which the communication it was given, the proof of receipt of communication to them, taking of attendance on the date of commission work whoever present at that time, the time when the commission work was stated and when it was completed, if it is postponed for further date, then, they should specify the date and time when it was stop and on which date and time it was postponed etc.

4. The both commissioners are hereby directed to submit joint report in respect of inspection and measurements of the suit flat and suit shop thereby showing the carpet area and built-up area as existing on the actual site with minute details, within 30 days from the date of receipt of notice of commission work.

5. *Furthermore, both commissioners are directed to mention the names of the parties or their representatives who were present and their presence, at the time of commission work was carried out, in their report.*

6. *The D.H. and J.D. both are directed to bear the expenses of commission work of their own commissioner, who are appointed by this court to do commission work on their request.*

7. *The D.H. and J.D. both are hereby directed to deposit a fees of Rs.10,000/- each towards the fees, for the time being, of their respective commissioner.*

8. *The D.H. and J.D. are hereby further directed to provide the necessary copies of the documents required by the commissioners for carrying out the commission work.*

9. *After the deposit of commissioner fees with this court, necessary writ be issued to commissioners."*

8 The learned counsel for the Respondent nos.1 to 4 original plaintiff submits that in view of subsequent development, both the parties acted on impugned order dated 11.10.2017 nothing survives in the present Writ Petition and same is required to be dismissed with costs.

9 I have heard both the sides

10 It is to be noted that in view of subsequent development i.e. both the parties acted on order dated 11.10.2017 passed by 8th Joint Civil Judge, Senior Division, Pune below Exhibit- 100 in Special Darkhast No.59 of 201, nothing survives in the present

Writ Petition.

11 Writ Petition stands rejected.

(K.K. TATED, J.)